UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

GARNER/MORRISON, LLC and INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL, #15, LOCAL UNION #86, AFL-CIO-CLC	Case 28-CA-21311
SOUTHWEST REGIONAL COUNCIL OF CARPENTERS and INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL, #15, LOCAL UNION #86, AFL-CIO-CLC	Case 28-CB-6585

RESPONDENT GARNER/MORRISON, LLC'S JOINDER AND STATEMENT OF POSITION

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Garner/Morrison, LLC joins in the Statement of Position submitted by the Southwest Regional Counsel of Carpenters. Additionally, in response to the Board's September 13, 2016 letter, Garner/Morrison, LLC submits this Statement of Position with respect to the issues raised by the remand of the above-captioned cases by the Court of Appeals for the District of Columbia Circuit in NLRB v. Southwest Regional Council of Carpenters and Garner/Morrison, LLC, 826 F.3d 860 (D.C. Cir. 2016).

STATEMENT OF POSITION

The underlying unfair labor practice charges are predicated solely on what transpired at a meeting on April 2, 2007 that lasted at most one and one-half hours. At the time of this meeting, Garner/Morrison, LLC ("G/M") had valid pre-existing agreements with the Carpenters. While G/M's tapers and painters had been previously covered by the Painters' 8(f) agreements, those agreements expired on March 31, 2007. Because the tapers and painters automatically became covered by the Southwest Regional Council of Carpenters' agreements with G/M upon expiration of the Painters' agreements, a meeting was held on April 2 for the sole purpose of having the Southwest Regional Council of Carpenters ("Carpenters") explain the health insurance and other benefits provided by the Carpenters and enroll the tapers and painters for benefits coverage. Unbeknownst to G/M's representatives, Carpenters' representatives solicited authorization cards at the conclusion of this meeting, and the Carpenters then presented the cards to G/M and demanded Section 9(a) recognition as to the tapers and painters.

Based on what transpired at the April 2 meeting the Board found that G/M violated Sections 8(a)(1) and (2) and that the Carpenters violated Section 8(b)(1)(A). For the reasons set forth in Garner/Morrison, LLC's ("G/M") Motion for Reconsideration, the Board erred in finding that G/M and the Carpenters violated the Act. As the Court of Appeals noted, in remanding these cases, the Board's order denying reconsideration relied on the absence of a claim of unlawful surveillance in distinguishing Coamo Knitting Mills, Inc., 150 NLRB 579 (1964), rather than any factual difference between what happened here and what occurred in

Coamo. Id. at 465. In this regard, the Court of Appeals correctly found that "[n]ot only are the facts in Coamo similar to the facts here, but the legal issues in Coamo mirror those here." Id. at 465. As a result, the Court of Appeals concluded that the Board's decision was "arbitrary and capricious because the Board did not provide a reasoned explanation for its departure from Coamo." Id. at 464.

The Court of Appeals was correct. The facts here and in Coamo are so materially similar that Board precedent under Coamo mandates a finding that the mere presence of G/M's representatives at the April 2, 2007 meeting did not taint the authorization cards, where G/M's representatives were unaware (in fact, clueless) of any authorization card signing, and were not in position to observe it. As a result, Coamo compels a finding by the Board that neither G/M nor the Carpenters violated the Act on the basis of what occurred at the April 2 meeting where authorization cards were solicited by the Carpenters' representatives from G/M's painters and tapers.

I. PERTINENT FACTUAL SUMMARY

A. PRE 2007 COLLECTIVE BARGAINING BACKGROUND

G/M is engaged in the building and construction industry as a drywall installation and painting contractor. Its principals/owners are Cliff Garner, Gary Travis Garner, and Chris Morrison. After incorporating in November 2003 and hiring one carpenter employee, G/M entered into a 2002-2006 Memorandum Agreement ("2002 MOA") with the Carpenters on or about December 3, 2003. [356 NLRB No. 163, slip op. at pp. 2 and 10.]

The 2002 MOA bound G/M to the 2002-2006 Southern California/Arizona/Nevada Drywall/Lathing Master Agreement ("2002 Master Agreement"). [356 NLRB No. 163, slip op. at p. 2; Joint Exhibit 1, page 1, ¶ 1.] The 2002 Master Agreement covered all of the drywall hanging and finishing work performed by G/M's employees, which included any tapers' or painters' work. [356 NLRB No. 163, slip op. at p. 10; Joint Exhibit 1, p. 1, ¶ 1; Joint Exhibit 5, pp. 3-4.]

Thereafter, G/M hired painters and tapers and entered into two separate agreements with the Painters. The first agreement covering a tapers unit was entered into by G/M on April 15, 2004. [Joint Exhibit 13.] The second agreement covering a painters unit was entered into by G/M on November 5, 2004. [Joint Exhibit 11.] Both agreements were effective through March 31, 2007. [356 NLRB No. 163, slip op. at p. 2.] The Painters were not the exclusive collective bargaining representative of the tapers and painters employed by G/M under Section 9(a) of the Act. Instead, the Painters' agreements were Section 8(f) agreements. [356 NLRB No. 163, slip op. at p. 11.] G/M's agreements with the Painters expired on March 31, 2007. Upon expiration of the Painters' agreement, G/M's painters and tapers became covered by G/M's agreement with the Carpenters. [356 NLRB No. 163, slip op. at p. 2.]

B. APRIL 2, 2007 MEETING

On April 1, the day after G/M's agreements with the Painters expired, G/M's representative called Carpenters' representative Mike McCarron and asked him to set up a meeting so that the Carpenters could explain their benefits and pension to G/M's painters and tapers. [356 NLRB No. 163, slip op. at pp. 3, 13; Tr. 174-175, 192, 195, and 203.]

Carpenters' representatives set up the meeting for 2:00 p.m. on Monday, April 2, at the Marriott Hotel. G/M's representatives had nothing to do with the time or location of the meeting. They did not arrange for the room where the meeting was to be held and did not pay for the hotel or any other expenses associated with the meeting. [356 NLRB No. 163, slip op. at p. 13; Tr. 78-79, 105, Tr. 184, 202-204, Joint Exhibit 19.]

After being advised of the meeting's details, G/M's representatives informed their painters and tapers about the meeting telling them that the Carpenters were going to make a presentation about their benefits. [Tr. 30, 78-79.] The meeting was not held during "work time." [Tr. 56, 104.] While employees were told they needed to attend the meeting to understand what the Carpenters' benefits were, the meeting was not mandatory and they were not ordered to attend. [356 NLRB No. 163, slip op. at p. 13; Tr. 30, 56, 78-79, 104, 127, 149.]

The meeting at the Marriott hotel started at about 2:00 p.m. and lasted at most one and one-half hours. It was held in a large room that was about 75 feet by 50 feet. The meeting was attended by Carpenters' representatives, three Cigna Healthcare representatives, and three representatives of G/M. [356 NLRB No. 163, slip op. at p. 13.]

Certain Carpenters' representatives were seated at the front of the room at a "presenters" table, a "prize" table was in front of them, the three owners of G/M were seated apart from the Carpenters' representatives at tables facing them, and the taper and painter employees were seated behind the owners' tables. At the opposite end of the room and about 65 feet away from where G/M's representatives were seated were two tables, one for Carpenters' representatives and another one for Cigna and trust fund representatives. [356 NLRB No. 163, slip op. at p. 13; Tr. 81-82, 107-109, 110, 233, Employer Exhibit 1.]

McCarron commenced the meeting by going to the podium and giving a presentation about the Carpenters' union, its history, structure, size, and organizing efforts. Morrison was then invited to speak and said that the company had not reached an agreement with the Painters, that the Carpenters had a lot to offer and they wanted to present their benefits package, and stated that "we think this is a good deal." [356 NLRB No. 163, slip op. at p. 13; Tr. 82, 83, 231, 232, 272, Joint Exhibit 15, pages 1-11.]

After Morrison spoke, Ron Schoen (Carpenters' trust benefit administrator) shared a PowerPoint presentation of the Carpenters' pension and healthcare benefits explaining that the Carpenters had arranged for "instant" benefits eligibility. After this presentation, there was a question and answer period during which the taper and painter employees asked questions. At some point, Morrison talked about his experience in transferring from the Painters' benefits to the Carpenters' benefits and explained that this transition went smoothly. Employees then started talking among themselves and followed with more questions to the Carpenters' representatives. The employees' questions dealt mostly with health insurance and pension issues and most of the meeting was spent talking about "the pension and insurance options." At no time did any of G/M's representatives respond to any employee questions. [356 NLRB No. 163,

slip op. at pp. 13-14; Tr. 83, 84, 161, 164, 188, 233, 234, Joint Exhibit 15, pages 12-28.]

After employees finished asking their questions, McCarron told them that there were Carpenters' representatives at the tables in the back of the room with "information packages and stuff." Employees then went to the tables at the back of the room to talk to the representatives stationed there. At the tables, employees signed medical insurance and benefit cards and forms and Carpenters' authorization cards. G/M's representatives, who were about 60 to 70 feet away, were unaware that employees were signing authorization cards and, could not hear what was being said and could not see what employees were filling out or signing at these tables. Moreover, no one from the Carpenters had ever informed G/M's representatives that the Carpenters would be asking employees to sign authorization cards at this meeting. [356 NLRB No. 163, slip op. at p. 14; Tr. 59, 85, 104, 110, 155, 165, 188, 189, 204-206, 233-234, 247-248, 284-285, Joint Exhibit 15, page 27.]

After employees had finished talking to the Carpenters' representatives at the two tables in the back and filling out forms, Hubel approached Morrison and showed him approximately 17 Carpenters' authorization cards and told him that the Carpenters had a "majority." About 23 tapers and painters were employed by G/M at the time of this meeting. Hubel and Morrison then signed a "Recognition Agreement" and a 2007-2010 Southwest Regional Council of Carpenters Arizona Drywall/Lathing Memorandum Agreement (hereinafter "2007 MOA") which Hubel gave to Morrison. Hubel explained that he wanted Morrison to sign the "Recognition Agreement" to acknowledge that the Carpenters had authorization cards from a majority of the painters and tapers. Hubel also asked Morrison to sign the 2007 MOA after explaining that, except for the term, it was basically the same contract as the existing contract (2005 MOA) that expired in 2007. [356 NLRB No. 163, slip op. at p. 14; Tr. 88, 189, 190-191, 206, 234-235, 235-236, General Counsel Exhibits 4 and 5, Joint Exhibits 3 and 4.]

The ALJ found that the "authorization card signing was unseen by, and unknown to, the [G/M] owners who had remained in the front of the room. The [G/M] managers could not have seen what, if anything, the employees were signing, because their view was blocked by the

employees at the tables. The only signing that had been discussed publicly was the necessity of signing the health insurance forms." [356 NLRB No. 163, slip op. at p. 14 (emphasis added).] These findings were not disturbed by the Board's Decision.

II. LEGAL ARGUMENT

A. COAMO KNITTING MILLS, INC., 150 NLRB 579 (1964), COMPELS A FINDING THAT G/M DID NOT ENGAGE IN UNLAWFUL SURVEILLANCE AT THE APRIL 2 MEETING.

Here, the ALJ dismissed the unlawful surveillance allegation, but this ALJ finding was rejected by the Board. In finding that G/M engaged in unlawful surveillance at the April 2 meeting, the Board found it unnecessary to pass on the ALJ's finding that G/M's representatives "positioned in the front of the room were unable to see what the employees were signing." [356 NLRB No. 163, slip op. at p. 3, fn. 8.] The Board found that "even assuming the Garner/Morrison executives could not see the exact documents that were signed, their presence in the room while the employees were being solicited to sign the Carpenters' documents constituted unlawful surveillance for the purpose of influencing employees to switch their allegiance to the Carpenters." [356 NLRB No. 163, slip op. at p. 5.]

In support of its unlawful surveillance finding, the Board relied on Moorehead City Garment Co., 94 NLRB 245, 255 (1951), enfd. 191 F.2d 1021 (4th Cir. 1951). Moorehead, however, does not support a finding of unlawful surveillance herein. Moorehead is readily distinguishable for the following reasons: First, unlike in Moorehead, G/M's representatives were at the April 2 meeting at the invitation of the Carpenters' representatives. Second, unlike in Moorehead, G/M's painters and tapers attended the April 2 meeting knowing that G/M's representatives would be present at the April 2 meeting. Third, notwithstanding the actual presence of G/M's representatives at this meeting, the painters and tapers openly engaged in "union activities" at this meeting unlike in Moorehead. Fourth, unlike in Moorehead, the undisputed evidence clearly proves that G/M's representatives were unaware that the Carpenters

would be soliciting authorization cards at the April 2 meeting.[1] Based on the foregoing, the Board's citation to Moorehead does not support a finding of unlawful surveillance herein.

Instead, as G/M contended before the Board, there was no unlawful surveillance at the April 2 meeting because "an employer's observation of employees' organizational activities does not violate the Act where "employees elect to conduct their organizational activity openly." Sunshine Piping, Inc., 350 NLRB 1186, 1194 (2007). While the Board rejected this contention, its rationale for doing so is unwarranted. The Board rejected this contention because it concluded that the "employees here did not elect to conduct their organizational activities openly." [356 NLRB No. 163, slip op. at p. 5.] First, the Board's rejection is based on its ignoring the evidence here. Thus, the Board stated that G/M did not "inform the employees of the meeting's purpose." [356 NLRB No. 163, slip op. at p. 5.] It is, however, undisputed that G/M's representatives informed their tapers and painters about the meeting telling them that the Carpenters were going to make a presentation about their benefits. [Tr. 30, 78-79.] As the ALJ found, G/M's representatives informed employees that they should attend the meeting "since it affected their health coverage." [356 NLRB No. 163, slip op. at p. 13.] Second, the Board's rejection is based on its unwarranted conclusion that the "employee's attendance at this meeting does not reflect their choice to participate in open organizational activity." [356 NLRB No. 163, slip op. at p. 5.] This conclusion is not supported by the record inasmuch as the undisputed evidence establishes that employees voluntarily attended this meeting as their attendance was not mandatory, and employees engaged in "union activities" in signing authorization cards while G/M's representatives were present. Clearly, the painters' and tapers' union activities at the April 2 meeting were conducted openly and the Board's citation to Moorehead does not support a finding of unlawful surveillance here.

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[1] While the Board in its Decision states that G/M "set up the meeting so that the Carpenters could recruit the painters and tapers" [356 NLRB No. 163, slip op. at p. 5.], the Board's statement attributes the Carpenters' purpose for having the meeting to G/M, and does so without any supporting evidence since, as the ALJ found, the evidence established that the purpose for the meeting from G/M's perspective was to discuss health coverage for its employees. See 356 NLRB No. 163, slip op. at pp. 13 and 14.

Moreover, to the extent the Board characterized what occurred at the April 2 meeting as "surveillance," such conduct cannot be deemed to be violative of the Act based on the Board's decision in Coamo. The conduct of the plant manager in Coamo was not materially different than that of G/M's representatives. In Coamo the plant manager was in a position to watch union representatives approach employees to sign authorization cards. But, the Board held this was not enough where the plant manager "was not standing in a position that would have enabled him to observe employees signing cards ... [because] ... he stood on the floor apart from the employees and could not and did not see any employees signing the cards." Coamo, supra at 581. Coamo's key holding is that presence of supervisors at a meeting where employees are solicited to sign authorization cards, but cannot and do not see employees signing the cards, is not coercive and does not violate Section 8(a)(2) and (1). Here, it is undisputed that G/M's representatives, as the plant manager in Coamo, were not in a position to see employees signing authorization cards and did not see any employees signing such cards. Under the Board's holding in Coamo, the presence of G/M's representatives at the April 2 meeting was not coercive, was not unlawful surveillance and, accordingly, did not violate Section 8(a)(1).

B. THE BOARD'S DECISION IN COAMO KNITTING MILLS, INC., 150 NLRB 579 (1964) COMPELS A FINDING THAT THE AUTHORIZATION CARDS WERE NOT TAINTED.

In its Decision, the Board, on the basis of its finding of unlawful surveillance at the April 2 meeting, concluded that such surveillance "tainted" the authorization cards solicited by the Carpenters and "tainted' their acquisition of majority status. [356 NLRB No. 163, slip op. at p. 5.] As a result, the Board found that G/M unlawfully assisted the Carpenters by extending recognition to the Carpenters based on the authorization cards signed at the April 2 meeting. [356 NLRB No. 163, slip op. at pp. 5.-6]

As noted above, the Board's finding that G/M engaged in purported unlawful surveillance is unsupported by law or facts. Moreover, the Board found the cards "tainted" in the absence of any evidence that any of the painters or tapers were coerced or even influenced to sign authorization cards by the presence of G/M's representatives. The General Counsel's own

witnesses testified that they experienced no coercion and were not influenced by the presence of G/M's representatives. [Tr. 39 (Servis); Tr. 161-162 (Porch).] Despite the presence of G/M's representatives at the meeting, at least four employees refused to sign authorization cards. [Tr. 57.]

Moreover, as the Court of Appeals correctly noted, the Board's decision ignores its own controlling precedent in Coamo Knitting Mills, Inc., 150 NLRB 579 (1964). Coamo is directly on point. There is no reasonable basis for distinguishing Coamo in finding that the presence of G/M's representatives "tainted" the authorization cards signed at the April 2 meeting. As the ALJ found, "Garner/Morrison executives positioned in the front of the room were unable to see what the employees were signing," but the Board rejected this finding as unnecessary to its analysis. [356 NLRB No. 163, slip op. at p. 3, fn. 8.][2] Likewise, the Board dismissed the ALJ's finding and undisputed evidence that G/M's representatives were completely unaware that the Carpenters' representatives were soliciting authorization cards at the April 2 meeting from G/M's painters and tapers, and that such solicitation was not seen by G/M's representatives. See 356 NLRB No. 163, slip op. at p. 14 ("The authorization card signing was unseen by, and unknown to, the Garner owners who had remained in the front of the room"); Tr. 110, 189, 204-206, 284-285, Employer Exhibit 1.

The Board in Coamo expressly held that the presence of employer representatives at a union meeting where employees signed authorization cards was not sufficient to taint the cards obtained by the union at such meeting. Thus, the Board stated in Coamo:

> The Trial Examiner attached critical importance to Galinanes' [company representative] presence at the July 17 meeting which, he found, 'necessarily had a coercive effect' on the employees present. The record does not support this conclusion. It is admitted that Galinanes was not standing in a position that would have enabled him to observe individual employees signing cards. To the contrary, Galinanes credibly testified that during the meeting, he stood on the floor apart from the employees, and that

[2] As noted above, the ALJ found that G/M's representatives "could not have seen what, if anything, the employees were signing, because their view was blocked by the employees at the tables. The only signing that had been discussed publicly was the necessity of signing the health insurance forms." [356 NLRB No. 163, slip op. at p. 14]

> he could not and did not see any employees signing the cards. Galinanes further testified that, and the Trial Examiner found, that management made no attempt to ascertain which employees even attended the meeting.
>
> We deem this evidence insufficient to support a finding that the mere presence of Galinanes at the meeting had the effect of coercing employees in their selection of the Union, thus tainting the majority status at the conclusion of this meeting."

Coamo, supra, 150 NLRB at pp. 581-582 (emphasis added). The Board's finding that the presence of G/M's representatives at the April 2 meeting tainted the authorization cards collected by the Carpenters' representatives simply cannot be reconciled with the Board's decision in Coamo.

Because the Board's decision in Coamo has not been overruled, it is directly applicable here. It is undisputed that G/M's representatives were not aware that the Carpenters' representatives intended to solicit authorization cards at the April 2 meeting. Like the plant manager in Coamo, it is also undisputed that G/M's representatives were not in a position to observe the authorization card signing at the April 2 meeting. This latter factor prompted the Board in Coamo to conclude that the authorization cards obtained by the union at a meeting at which employer representatives were present were not tainted and that the employer did not violate Sections 8(a)(2) and (1) in extending recognition on the basis of those cards. The same result is compelled herein because there is no basis for distinguishing what occurred in Coamo with what transpired here at the April 2, 2007 meeting.

C. CONCLUSION

For the reasons noted above, Garner/Morrison, LLC requests that the Board adhere to its holding in Coamo, and find that G/M and the Carpenters did not violate the Act based on what occurred at the April 2, 2007 meeting, and thereby dismiss the complaint.

Respectfully submitted,

DATED: September 27, 2016

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CERTIFICATE OF SERVICE

I, Richard S. Zuniga, declare as follows:

1. I hereby certify that on September 27, 2016, I filed **RESPONDENT GARNER/MORRISON, LLC'S JOINDER AND STATEMENT OF POSITION** in Cases 28-CA-21311 and 28-CB-6585, via E-Filing.

2. I hereby certify that on September 27, 2016, I caused to be served true copies of **RESPONDENT GARNER/MORRISON, LLC'S JOINDER AND STATEMENT OF POSITION** in Cases 28-CA-21311 and 28-CB-6585, by first-class U.S. Mail and by E-Mail on the following parties:

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I hereby certify that the foregoing is true and correct. Executed this 27th day of September 2016, at Los Angeles, California.

Richard S. Zuniga

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